

continued existence of the basic plans is not evidence of service stagnation, however. The strong subscribership demonstrates that the plan is one that Connecticut end users feel is reasonable given their needs. In addition, today subscribers to the basic plan receive a vastly expanded product with statewide cell site coverage compared to the limited network coverage offered when the plan was first introduced.^{24/} Aggressive competitive retail pricing will continue in Connecticut as competition continues to accelerate and new, well-funded and experienced CMRS providers enter the market exempt from both wholesale and retail rate regulation.^{25/}

**5. Wholesale Cellular Competition Has Intensified
Due to Bell Atlantic's Entry**

As described above, competition in the wholesale cellular market in Connecticut intensified dramatically following the purchase of the Metro Mobile Companies by Bell Atlantic. Today, Springwich, the Connecticut wireline carrier, once thought to have a major advantage in a two-carrier cellular market, is the lower market share carrier in Connecticut. The increasing consolidation in the cellular industry is indicative of the progression in wireless services towards economy of scale. National or, at a minimum, regional service networks and name recognition are critical to the continued success of cellular operators and new CMRS

^{24/} Indeed, Springwich's cell site coverage now includes portions of Massachusetts and subscribers can call throughout the combined territory without incurring toll charges.

^{25/} Springwich fully expects that these new CMRS providers will largely be established telecommunications companies, such as the Regional Bell Operating Companies, and large interexchange carriers, such as MCI and AT&T/McCaw.

entrants. Multi-state carriers such as BAMM have that embedded advantage that they use in full force against competitors such as Springwich.

It is undisputed that BAMM is a major market force in wireless telecommunications and an aggressive competitor. While initially, as the wireline carrier, Springwich held a 100 percent market share in 1985, in 1993 it served roughly 46 percent of the market. *See Exhibit 4 attached hereto.* This shifting market share is the product of vigorous wholesale competition and is consistent with the Commission's expectation for competition in the cellular industry. Indeed, the fact that the market share between Springwich and BAMM is now roughly equal is incontrovertible evidence of competition. The Commission has recognized that "the foundation of the cellular industry's structure relies on full facilities-based competition between carriers *who possess relatively equal market power in the service area.*"^{26/} Accordingly, the market fluctuation between Springwich and BAMM demonstrates the appropriate competitive behavior of each wholesale carrier as they both seek to maximize subscribership.

6. The Cellular Market Structure Has Produced Concentration And Competition

The two-carrier market structure established by the FCC, together with a common carrier structure whereby multiple resellers can compete, has assured ever-improving service and protection against unjust or unreasonable rates. A number of features of the cellular marketplace in Connecticut, including the measure of market concentration produced by the Herfindahl-Hirschman Index ("HHI") are a product of the duopoly structure adopted by the FCC for cellular

^{26/} *Resale Policy Order, supra* n.15, at 1721 (emphasis added); *see also* Charles River Associates Study, *supra* n.4, at 9.

services. The fact that such measures indicate that a two-carrier market is highly concentrated simply proves the obvious -- they do not, however, demonstrate that the concentrated market is not functioning in a competitive fashion.

In establishing the duopoly structure for cellular services, the FCC recognized that the structure it selected would not yield the *most* competitive market.^{27/} The FCC's decision to license only two cellular carriers in each market was premised on its broad mandate not just to encourage competition, but also to balance the technical requirements for the service and the scarcity of radio spectrum:

After considering each of these options, we have concluded that the licensing of two 20 MHz systems would best serve the public interest, convenience and necessity. In our view, this approach affords the public the benefits of some facilities-based competition in cellular service, while also taking into account the convincing record evidence before the Commission that, from a technical standpoint, cellular systems should be allocated no less than 20 MHz each.^{28/}

Calculations of the HHI or any other measure of market concentration are unlikely to differ significantly in Connecticut and other cellular markets nationwide. The HHI is an analytical tool that indicates the *degree of concentration* of a particular industry in a particular market, and is utilized by the Department of Justice, the Federal Trade Commission, the

^{27/} See *In the Matter of Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, Report and Order*, 86 FCC 2d 469, 474 (1981) *aff'd on recon.*, 89 FCC 2d 58 (1982).

^{28/} *Id.* at 476. In its ruling, the FCC rejected the Department of Justice's position that the FCC adopt a flexible licensing scheme for cellular service with smaller spectrum allocations. While the FCC noted that an unlimited entry approach, such as that proposed by the Department of Justice, was attractive from a "purely competitive point of view" the FCC construed its public interest standard to be comprised of more than only the "encouragement of competition." *Id.* at 477.

National Association of Attorneys General, and the courts in scrutinizing mergers and acquisitions. It has never been considered by the courts or antitrust enforcement agencies as evidence of whether anti-competitive acts or practices *have in fact occurred*. In addition, the fact that the HHI for cellular carriers has hovered at slightly over the 5,000 mark for the last few years is to be expected in Connecticut *and in every other market throughout the United States*; in a market with only two competitors it is mathematically *impossible* for the HHI to be below 5,000. Therefore, to the extent any inference can be drawn from the HHI of the wholesale cellular market in Connecticut, the only permissible inference is that the wholesale cellular market is as competitive as it is permitted to be by law.^{29/}

**7. Multiple CMRS Providers Exist in Connecticut
Today**

In Connecticut, consumers have a choice today in purchasing CMRS and selecting a CMRS provider. There are at least 15 resellers that offer cellular services. These cellular resellers provide Connecticut end users with a range of competitive choices in purchasing cellular services. As noted above, at the retail level resellers offer a diversity of pricing plans that provide consumers with different service options to meet the changing usage patterns of mobile service users.

Paging services are also widely available in Connecticut. There are approximately 40 paging companies offering paging services in Connecticut that are often substituted, in some

^{29/} The HHI also significantly declines when the full array of CMRS providers, including SMR and PCS, properly are considered. See CTIA Competition Study, *supra* n.7, at 25-28.

form, as a lower cost alternative to certain uses of cellular services.^{30/} See Exhibit 8 attached hereto. Dispatch and SMR services also are available in Connecticut today as an unregulated alternative to certain uses of cellular services and in packages tailored to meet the mobile user's needs.^{31/} See Exhibit 9 attached hereto. These services will soon compete with both existing cellular service and ESMR services that Nextel will offer in Connecticut. The options for CMRS available in Connecticut provide consumer choice and competitive options. These services also serve as a competitive market force upon the wholesale cellular carriers and protect subscribers against unjust and unreasonable cellular rates.

**B. Connecticut Will Be Among the First Markets Targeted
By New CMRS Providers**

Connecticut is one of the top markets for the introduction of new CMRS. The state ranks *first in per capita* income in the United States. In addition, the geographic location of Connecticut between New York City and Boston and the state's own major metropolitan areas, make Connecticut a key state for new CMRS providers. The population density of Connecticut

^{30/} The features available from paging services have evolved significantly and their advantageous cost make them a supply substitute for cellular. See CTIA Competition Study, *supra* n.7, at 15.

^{31/} The Petition concludes that SMR services are not competitive with cellular service based upon the mistaken understanding that such service is not interconnected with the public switched network. While this may originally have been correct, regulatory changes have enabled SMRs to offer services that are interconnected to the public switched network. See *In the Matter of Eligibility of the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications*, GN Docket No. 94-90, Notice of Proposed Rulemaking (rel. August 11, 1994) at n. 10 (describing legislative and regulatory liberalization of SMR rules to permit interconnection with the public switched network). In addition as the Commission recently recognized, SMR licensees have also developed innovative, digital applications that allow users nationwide to send both voice and data transmissions. *Id.* at 3. See also CTIA Competition Study at 2.

also makes Connecticut an ideal state for wireless services. In Connecticut a population of 3.6 million resides within the state's 5,005 square miles. Based on these market characteristics, Connecticut will be one of the first states to experience the arrival of new competitive providers of PCS and ESMR.

In Connecticut, possibly before any other market, the Commission's vision of intensified competition in the wireless industry will be realized. Nextel has already established a number of antenna sites in Connecticut in anticipation of its planned initiation of Connecticut service in the first quarter of 1995.^{32/} See Exhibit 2 attached hereto. In addition, Connecticut is a part of the New York City MTA making it a prime target for the large telecommunications companies such as AT&T and MCI that are expected to bid for broadband PCS licenses later this year. The well-financed, well known entities that win the broadband PCS auctions will focus on speed to market and quickly deploy their national engineering and marketing teams to offer service in Connecticut. The presence of unregulated regional CMRS operators in Connecticut, like the entry of BAMM, will challenge the smaller wholesale carriers like Springwichee to remain competitive. Springwichee is already reacting to that competition but will be restrained in its ability to compete if rate regulation is extended.^{33/}

^{32/} Regardless of the Commission's ultimate decision as to whether to permit continued wholesale cellular rate regulation in Connecticut, given the pendency of this proceeding, Nextel's unregulated entry into Connecticut within the next year will occur while the Connecticut cellular carriers remain subject to rate regulation.

^{33/} Dr. Jerry Hausman, who recently studied cellular penetration and prices in the United States, has concluded based on statistical analysis that market penetration for cellular subscribers is lower in states that regulate cellular. Affidavit of Professor Jerry A. Hausman at 8-11 ("Hausman Cellular Pricing Affidavit"). A copy of Dr. Hausman's affidavit is attached as Exhibit 10 hereto. (The original of Dr. Hausman's affidavit is being filed by CTIA.)

C. Asymmetrical Regulation in Connecticut Would Frustrate the Congressional Goal of Regulatory Parity in CMRS

The exclusive regulation of rates of the wholesale carriers in Connecticut would impede the creation of regulatory parity in Connecticut. In today's circumstances, if the FCC permits continued regulation, wholesale cellular service would be the *only* CMRS rate regulated in the state. In contrast, the Nextel ESMR service, intrastate paging, SMR, and emerging PCS providers and retail cellular providers are not and will not be subject to rate regulation in Connecticut.^{34/} Accordingly, to the extent that the Commission were to permit the three cellular licensees which serve Connecticut to remain rate regulated until a proceeding initiated in July 1996 is completed, or until October 1997 if the Department determines to continue rate regulation thereafter, the cellular carriers would be subject to disparate regulation. This disparate regulatory framework would substantially disadvantage the wholesale cellular carriers with respect to their competitors who, especially given the lengthy period of favorable regulatory treatment, would likely be all the more anxious to target Connecticut as an initial market.

These new circumstances differ markedly from the situation in 1991, when the Department found that all of its criteria for forbearance from state cellular rate regulation had been met, but nevertheless decided to continue regulation on the ground that forbearance would not *enhance* competition.^{35/} As recognized in the Budget Act and by the Commission, today's CMRS market is converging into a single competitive services market where even minimal rate

^{34/} See Conn. Gen. Stat. §§ 16-247c, 16-250b.

^{35/} Decision, *Application of Springwich Cellular Ltd. Partnership for a Declaratory Ruling Re: Forbearance From Regulation of Rates of Cellular Telephone Mobile Telephone Service*, Docket No. 90-08-03 (Sept. 25, 1991) ("Forbearance Decision").

regulation unevenly applied would impede competition.^{36/} As the Commission itself recognized in its decision to forbear from requiring the filing of interstate tariffs by cellular carriers, the mere filing of tariffs regardless of the notice period can impede competition, and if applied asymmetrically to some CMRS providers but not others, would impede the development of a competitive market.^{37/}

Moreover, asymmetrical regulation of CMRS providers in Connecticut would frustrate the Congressional goal of regulatory parity among existing and new market entrants.^{38/} Indeed, as indicated in the Conference Report accompanying the Budget Act, such disparate regulation undermines the fundamental purpose of the Budget Act:

It is the intent of the Conferees that the Commission, in considering the scope, duration or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission, so that consistent with the public interest, similar services are accorded similar regulatory treatment.^{39/}

^{36/} Dr. Jerry Hausman also has found in his research that retail cellular prices generally are 15% higher in states that regulate cellular services and that regulation is the major factor associated with those higher prices. Hausman Cellular Pricing Affidavit, *supra* n.33, at 5-6.

^{37/} *Second Report and Order* at ¶ 177 (tariff requirements (1) take away ability to make rapid, efficient responses to changes in demand and costs, and remove incentives for carriers to introduce new offerings; and (2) impose costs on carriers that attempt to make new offerings).

^{38/} Budget Act, § 6002(d)(1); *see also* H.R. Report 2264, 103rd Cong., 1st Session (1993) at 496 ("*Conference Report*"); *Second Report and Order* at ¶¶ 2, 13 (by establishing a new class of commercial mobile radio services, Congress has taken a comprehensive and definitive action to achieve regulatory symmetry in the classification of mobile services).

^{39/} *Conference Report* at 494 (emphasis added).

III. GIVEN THE COMPETITION THAT EXISTS BETWEEN THE CELLULAR CARRIERS (AND WHICH WILL SOON INCREASE WITH THE ENTRY OF NEW CMRS PROVIDERS), THERE IS NO REASON TO CONTINUE RATE REGULATION

For all of the reasons discussed above, Springwich submits that the CMRS marketplace in Connecticut should be permitted to operate without continued rate regulation. The marketplace has proven to be precisely that for which the Commission hoped in developing its cellular market structure -- a rapidly expanding market in which the two carriers compete vigorously in both service and rates, and in which the retail market encompasses a number of resellers who are aggressive competitors. Importantly, the Department's Decision did not find any conclusive evidence that the existing marketplace is not providing consumers with ever-increasing service quality and ever-decreasing rates, or that market conditions have failed to protect consumers from unjust and unreasonable rates. Instead, the Decision examines the two-wholesale carrier market structure and concludes that the wholesale market cannot be *effectively* competitive until additional CMRS entrants have been in service "approximately one to two years." Decision at 29. As shown above, this finding discounts the fact that the wholesale cellular market is *already* as competitive as anywhere in the country, and that new entrants will only *increase* that competition. Moreover, as discussed below, the items which the Department intends to review in the interim prior to its 1996 investigation do not demonstrate that the current rates are unjust, or that continued rate regulation is justified.

A. Current Regulation of the Wholesale Cellular Carriers in Connecticut

The Department has jurisdiction under Connecticut state law to regulate cellular carriers licensed by the FCC. The Department does not regulate the retail cellular carriers nor does it regulate other forms of mobile services such as paging, SMR, or PCS.^{40/} The Department requires the wholesale cellular providers to file tariffs with the Department setting forth their wholesale rates. The Department regulates the rates of the wholesale carriers by permitting them to tariff a band of rates and by approving the elements of the rates such as billing increments and discount structures.^{41/} The wholesale carriers' effective rates (which have consistently declined) and rate elements, such as billing increments and volume discounts, have consistently been approved by the Department. Changes to the rate bands or to the effective rates charged within the band are subject to a five day notice period.^{42/} Protests to the tariff filings, that have in the past routinely been initiated (and ultimately rejected by the Department), can delay the implementation of a rate change beyond the notice period. Under this regulatory

^{40/} Telecommunications legislation enacted by the Connecticut State Legislature, which became effective in July, 1994, does not apply to the Petition since it became effective after June 1, 1993 -- the date of existing regulation specified in the Budget Act. Accordingly, the new statute has no bearing on the Petition or subsequent rate or entry regulation of the CMRS carriers.

^{41/} The tariffs of the carriers that are attached to the Department's decision specify the rate structure and permissible range of rates in the section of the tariffs entitled "Rates and Charges." The rate elements specified in the tariffs include the method of calculating the rates, such as billing increments and volume discounts. The actual rate levels within the permissible range are specified in the "Effective Rates" sections of the tariffs. *See Re SNET Cellular Inc.*, Docket No. 87-10-23, 91 PUR 4th 525, 532 (1988).

^{42/} The Department's Decision reduced the existing tariff notice period from 30 to 5 days.

structure, wholesale cellular prices have continued to decline over the years and, despite the tariff flexibility to do so, have never increased.

While the Department's regulation of the wholesale carriers has to date applied equally to all of the wholesale cellular carriers, the Budget Act's mandate for regulatory parity and promotion of new CMRS competition, which includes a fundamental shift away from regulation and embraces competition, would create a regulatory disparity between the cellular carriers and their other CMRS competitors if that rate regulation is permitted by the Commission to continue. Continued regulation of the wholesale carriers in Connecticut must therefore be considered in the context of this national mandate and in the context of the imminent arrival of unregulated new competitive CMRS entrants such as PCS and ESMR.

**B. The Wholesale Rate Levels Are Reasonable, As Evidenced By
the Carriers' Reasonable Rates of Return**

Significantly, the Department did not make the finding required under the Budget Act to justify continued rate regulation -- it did *not* find that the approved tariff rates of the wholesale carriers are unjust or unreasonable. One of the issues which the Department seeks to investigate further, however, is the seemingly disparate rates of return calculated by the carriers and the proponents of rate regulation in the proceeding below. The FCC must therefore determine whether the uncertainty of the Department on this issue justifies continued rate regulation. Analysis of the returns produced by the actual (and proprietary) financial data provided by Springwich and BAMM in the proceeding demonstrated that, when calculated in a manner consistent with the way telephone company returns are analyzed by the Commission and the Department, the wholesale carriers in Connecticut are earning competitive returns. The

Commission will therefore need to examine the methodology used by the proponents of continued regulation to inflate those returns to determine whether the disparity supports continued rate regulation.^{43/} Given that the witnesses who produced the higher rates of return represented that many of their "adjustments" were based upon the manner in which they predicted the Commission would review cellular rates of return, the Commission is in a position to evaluate these manipulations for consistency with FCC procedures and to determine the credibility of the "adjusted" rates of return produced by the resellers.

A range of returns far in excess of those calculated using the carriers' actual financial data was produced through gross manipulations of the data in at least five arbitrary and wholly self-serving ways. Indeed, not only did the resellers exclude a number of costs and expenses from their calculations which are considered allowable by the FCC and the Department in calculating rates of return, they had to resort to the wholesale substitution of one carrier's expenses for the other's in order to inflate the rates of return -- a tactic that bears no relation to *any* legitimate method of calculating a return. It will certainly come as no surprise to the Commission that BAMM's expenses are significantly lower in certain respects than those of

^{43/} As Dr. Jerry Hausman, an expert witness in the proceeding below recently attested in an affidavit filed with Judge Greene, both Springwich and BAMM have been earning rates of return in the range of 15 percent for the past three years. Hausman Affidavit at 9. Rates of return at this level were conceded to be reasonable by all parties to the DPUC proceeding. To enable the Commission to review the supporting evidence, copies of the proprietary financial data provided by Springwich to the Department and the rate of return calculations prepared by Dr. Hausman and the resellers' witnesses are being submitted to the Commission under protective cover with a request for confidentiality.

Springwich due to economies of scale achieved by BAMM's multi-state cellular operations.^{44/} Not surprisingly, therefore, the substitution of BAMM's expenses in the Springwich financials serves to inflate substantially -- and artificially -- Springwich's rate of return.

Other efforts undertaken to inflate the carriers' rates of return were equally transparent. For example, the resellers excluded the carriers' cost of construction work in progress -- a cost that both the Department and the FCC permit telephone companies to include in calculating rates of return. Similarly, while agreeing that the SNET tax rate should be imputed to the Springwich limited partnership, the resellers refused to accept the actual tax rate for SNET reported in its annual report to shareholders and through their calculations thereby inflated Springwich's income.^{45/} The resellers also eliminated all amounts for BAMM's investment in its deferred cellular licenses and start up costs, while at the same time acknowledging that spectrum is a tangible asset for which BAMM and its predecessor Band A carrier had incurred certain costs.

^{44/} The expense item cited by the parties as indicating that BAMM's expenses should be substituted for those of Springwich was Springwich's cost for acquisition and installation of a state-of-the-art billing system. Since Springwich's expenses exceeded those of BAMM in proportion to overall investment, the parties concluded that Springwich's expense must be artificially high. Of course, however, it is entirely expectable that the massive expense of a billing system, spread over combined cellular systems roughly ten times the size of the Springwich system, might lead to certain economies of scale on a system-by-system basis. Indeed, the substitution of BAMM's expenses is similar to substituting the prorated expenses of a Wal-Mart store for the expenses of a one-location appliance store.

^{45/} Instead, they inflated SNET's income by inappropriately deducting interest expense from total costs and expenses. This increased income was then divided into the taxes actually paid by SNET. Use of this inflated denominator decreased the calculated income tax rate. Not surprisingly, if interest expense was properly included in income, the tax rate would have been equivalent to the tax rate in SNET's annual report.

These and other efforts were all aimed at inflating rates of return that, when calculated using actual financial results, are reasonable by all conceivable definitions. Indeed, prior to receiving the carriers' actual financial data, the witnesses supporting continued rate regulation predicted that the cellular carriers were earning an unreasonable rate of return and testified that the Department should limit a rate of return for a cellular carrier to approximately 15 percent. Moreover, when they calculated the rates of return for the carriers using actual financial data, these witnesses produced rates of return within the range of the return they had agreed was reasonable. They therefore had to resort to the "adjustments" described above to bring the actual rates of return into the range of their initial predictions. The Commission must reject this transparent effort to disguise the reasonable rates of return of the wholesale cellular carriers and should conclude instead that the actual rates of return do not warrant continued rate regulation.

**C. The Non-Discriminatory Volume Discount Structure Currently
in Effect is Reasonable and Consistent With The
Communications Act**

As the tariffs attached to the Department's Decision indicate, the wholesale cellular carriers have introduced rate structures that include volume and longevity discounts and promotions. These tariffs have been approved by the Department pursuant to Connecticut law, and the Department's regulations which require that cellular mobile telephone service rates be reasonable and non-discriminatory.^{46/} These volume discounts were designed for a start up

^{46/} Conn. Gen. Stat. §16-250b; Conn. Agencies Regs. §16-250b-3 (1987). *See* Decision, *SNET Cellular, Inc.'s Proposed Revision to its Tariff*, Docket No. 87-10-23 (1988); Decision, *Application of Metro Mobile CTS, Inc. -- Revision to Wholesale Cellular Mobile Telephone Services Tariff*, Docket No. 88-11-26 (1989) ("*Metro Mobile Tariff Decision*"). In addition, volume and longevity discounts were found to provide resellers with additional flexibility in the
(continued...)

industry to encourage resellers to grow their customer base and to increase air time usage. The volume discount rate structure is offered on a non-discriminatory basis to all resellers.^{47/} Volume discounts are commonly employed throughout the telecommunications industry.^{48/} The FCC has determined that volume discounts are permissible under the Communications Act as a means of promoting the additional purchase of telecommunications services. Indeed, the FCC has previously rejected challenges by cellular resellers to the volume discount structure of wholesale cellular carriers, so long as they are applied equally to all similarly situated customers. There are no findings in the Decision that the volume discounts offered by either carrier are not made available to all similarly situated resellers on a non-discriminatory basis depending on volume. Without such a showing, the volume discounts can not be sustained as discriminatory or anti-competitive and do not justify continued rate regulation.^{49/}

^{46/}(...continued)

cellular marketplace. *Metro Mobile Tariff Decision* at 12. The Department affirmed its determination that the volume discounts offered by the carriers were non-discriminatory in 1991. See *Forbearance Decision*, *supra* n.35, at 6.

^{47/} Resellers qualify for different discounts, of course, based on their subscriber and air time volume. Each reseller, however, pays the same rate within each volume discount tier. For example, the monthly cellular number charge is the same for the first 500 numbers for all resellers. Likewise, the volume discount for cellular numbers over 200,000 only applies to those cellular numbers over 200,000 and not to the numbers up to 200,000.

^{48/} AT&T, MCI and Sprint all have one minute billing increments in their basic interstate tariffs. See AT&T Tariff F.C.C. No.1 at p.53 (initial billing period of one minute for all classes of service); MCI Telecommunications Corporation Tariff F.C.C. No.1 at p. 1.9.1.1.1 (charges for domestic calls under rate plan billed in one minute increments); Sprint Tariff F.C.C. No.1 at p.168 (charges for domestic calls billed in one minute increments).

^{49/} *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106, 1111-12 (D.C. Cir. 1992). The Interstate Commerce Commission ("ICC") also has approved rate discounts based on volume as non-discriminatory. The ICC's decision was upheld on appeal by the U.S. Court of Appeals for (continued...)

In *MCI Telecommunications Corp. v. AT&T*, File No. E-90-28, 7 FCC Rcd. 5096 (1992), the Common Carrier Bureau of the FCC rejected MCI's claim that AT&T's volume and term discounts violated Section 201(b) of the Communications Act and were in conflict with the Commission's policies on volume discount and resale activity. MCI alleged that AT&T's discount plans were specifically designed to encourage third parties to aggregate usage of unrelated 800 service customers in order to obtain discounts for which they would not individually qualify. The Common Carrier Bureau found:

It is not *per se* a violation of the Act or any Commission order to offer rate structures which promote the practice of aggregation of unrelated end users or volume discounts. . . . the Commission has stated that resellers must be allowed to take a volume-discounted offering on the same terms as a single, high volume customer because resale helps many small users benefit from volume discounts. . . . We find no merit in MCI's claim that AT&T's provision of tariffed volume and term discount plans conflicts with the Commission's resale policy.^{50/}

In the cellular area, the Commission has also recognized the appropriateness of volume discounts so long as they are applied to similarly situated customers. In its *Resale Policy Order*,

^{49/}(...continued)

the D.C. Circuit. The court agreed that shippers with different volume requirements were not similarly situated with other shippers tendering lower volumes of traffic and therefore that no discrimination resulted from differential pricing for these shippers. *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984).

^{50/} *Id.* at 5098. The FCC also has upheld the use of volume discounts in the context of private line services. *In the Matter of Private Line Rate Structure and Volume Discount Practices*, 97 FCC 2d 923 (1984).

the Commission stated:

Under our resale policy, facilities-based carriers offering a bulk rate to certain customers must make the bulk rate available to resellers on a non-discriminatory basis and on the same terms and conditions as made available to other similarly-situated customers.^{51/}

There is no dispute that volume discounts contained in Springwich's wholesale Connecticut tariff are consistent with this requirement, since the discounts set forth therein are available to all resellers based on their volume. The only concern raised by the Department revolves around the fact that the affiliated retail arms of the wholesale carriers are eligible for the highest level discount, and it seeks to investigate whether that fact is anti-competitive. Springwich notes that many of the resellers in business today entered the market at the same time and at the same level of subscribers -- zero. Some, including SMI and the BAMM retail arm, have clearly adopted marketing strategies to increase their subscriber base and thereby to qualify for increasing volume discounts. Indeed, Springwich's second largest retail customer has employed such a strategy and qualifies for the next highest discount level.

This type of non-discriminatory volume discount structure is precisely the type of structure common in the telecommunications and many other industries, and tariffs containing discounts have been approved by the Department under this standard since their introduction by Springwich in 1988 and by BAMM in 1989 and more recently in 1991.^{52/} Given that the Petition does not reach a conclusion that the volume discount structure is unjust or unreasonable, that such structures are prevalent in all segments of the telecommunications industry and are

^{51/} *Resale Policy Order, supra* n.15, at 1725-26.

^{52/} *See supra* n. 46.

consistent with the Communications Act and the FCC decisions, the volume discount rate structure does not warrant continued rate regulation.

IV. IMPOSITION OF EQUAL ACCESS REQUIREMENTS ON PROVIDERS SUCH AS SPRINGWICH IS AN INTERSTATE MATTER PENDING BEFORE THE FCC, AND DOES NOT JUSTIFY CONTINUED STATE RATE REGULATION

Springwich's decision not to provide equal access to long distance carriers for interstate calls outside the Springwich cellular network does not justify continued state rate regulation. The decision to direct interstate calls to a single interexchange carrier is common among non-BOC cellular carriers. Springwich is not governed by the Modification of Final Judgment and, consistent with all other non-BOC cellular carriers, does not currently offer cellular subscribers equal access to interexchange carriers. Moreover, the issue of imposing equal access obligations on non-BOC cellular carriers currently is pending before the FCC. *See In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rule Making and Notice of Inquiry*, CC Docket No. 94-54, RM-8012 (rel. July 1, 1994).^{53/} In Connecticut, a single LATA state, equal access is, by definition, a solely interstate issue. Therefore, the outcome of the Commission's current rulemaking will determine the equal access obligations of Springwich, and this issue has no bearing on, or relevance to, whether to permit continued state rate regulation.^{54/}

^{53/} SMI filed comments in that proceeding on September 12, 1994.

^{54/} Springwich notes that it has taken steps to provide all its resellers with competitively priced interexchange services. Springwich previously used AT&T to carry the interstate calls
(continued...)

V. THE WHOLESALE AND RETAIL RELATIONSHIPS OF THE LICENSED CELLULAR CARRIERS IN CONNECTICUT ARE CONSISTENT WITH FCC POLICY AND HAVE NOT PRODUCED ANTI-COMPETITIVE CONDUCT OR DISCRIMINATORY PRACTICES

Each of the wholesale carriers in Connecticut is affiliated with or has as part of its organization a retail cellular provider. In the case of BMM, the wholesale and retail carrier are the same entity. As described above, Springwiche does not provide retail cellular services. Retail cellular services are provided by SMI, a corporate affiliate of Springwiche. Both the BMM and Springwiche corporate structures are entirely consistent with the requirements of the FCC and state regulation. Since the inception of the cellular industry, the FCC has refused to require structural separation between the wholesale and retail arms of licensed cellular carriers, citing among other things, the costs that such separation would impose.^{55/} The FCC has

^{54/}(...continued)

originating on its cellular network. Recently, in an effort to reduce costs to its resellers and their end users, SNET America was selected as the interexchange carrier. Prior to selecting SNET America as the interexchange carrier, Springwiche received bids from a number of interexchange carriers. Springwiche also provides resellers a discount on all long distance charges placed by cellular end users over the SNET America network. In addition to using the presubscribed long distance carrier, customers who subscribe to cellular resellers using the Springwiche network may use their own interexchange carrier by dialing the access code of that carrier. Springwiche also notes that the imposition of equal access obligations on Springwiche also would increase the cost of certain calls for cellular end users. Springwiche currently does not impose any toll charges for calls within its service area, including the State of Connecticut and portions of Massachusetts. The imposition of an equal access requirement, however, absent a waiver, would require that Springwiche pass traffic to a presubscribed interexchange carrier which then could collect a toll charge for interstate calls which currently are not assessed a toll charge. Accordingly, mandatory equal access could increase end user charges for cellular subscribers and is not in the best interest of Connecticut consumers.

^{55/} See *Resale Policy Order*, *supra* n.15, at 1726 & n.74. See also *In the Matter of Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use Dispatch Communications*, Notice of Proposed Rulemaking (rel. (continued...))

instead relied upon the obligation of wholesale carriers to make services and rate plans available to their retail operations and to unaffiliated resellers on non-discriminatory terms.^{56/} Similarly, state regulation does not require structural separation between wholesale and retail cellular carriers and accordingly, structural separation is not a component of regulation that existed on June 1, 1993 and is not properly a subject of the Petition.^{57/}

Although not obligated to ensure structural separation between its wholesale operations and the retail operations of its affiliate, Springwich maintains strict cost separation between the operations to ensure the accurate allocation of costs. Specifically, Springwich adheres to accounting separations contained in the FCC's Cost Allocation Manual ("CAM") and the Uniform System of Accounts ("USOA") for cellular carriers. The operational expenses of

^{55/}(...continued)

Aug. 11, 1994) (seeking comment on whether requirement of structure separation beyond accounting rules would undermine the potential public interest benefits of wireline entry into the SMR and commercial SMR markets); In *the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order*, GN. Docket No. 90-314, 8 FCC Rcd. 7700, at ¶ 126 (determining that requiring structural separation for LECs providing PCS would seriously undermine the ability of LECs to take advantage of their potential economies of scope and jeopardize public interest benefits of wireline participation in PCS).

^{56/} See, e.g., *Resale Policy Order*, *supra* n.15, at 1724 (resale policy requires that any volume discounts available to cellular's large retail customers must be available on the same terms and conditions to other resellers).

^{57/} The corporate structure of the wholesale and retail operations is not the type of issue contemplated by Congress as remaining with the states -- particularly where, as here, the state did not formerly regulate or otherwise restrict the corporate structure and, indeed, the state had recognized the overlap of functions on several occasions. See *Re SNET Cellular, Inc.*, 91 PUR 4th 525, 528, 530 (1988); *Southern New England Telephone Company Tariff Filing to Provide Bulk Domestic Public Cellular Telecommunications Services*, Docket No. 84-08-16; See also H. Rep. No. 103-11, 103rd Cong., 1st Sess. 261, reprinted in 1993 U.S. Cong. & Admin. News 378, 588.

Springwich, as documented in Springwich's financial statements, have been audited by Springwich's outside accounting firm, Coopers and Lybrand, and certified by that firm as an accurate reflection of Springwich's financial affairs. Moreover, the vast majority of costs incurred by Springwich are directly charged costs, as opposed to allocated costs.^{58/} These costs including expenses for employee time and office space are charged directly to Springwich on a fully-loaded cost basis.

Where there is any overlap in management responsibilities between Springwich and SMI, the companies have taken steps to ensure that wholesale and retail information is closely guarded and not shared. *See* Affidavit of Mark W. Bluemling attached as Exhibit 6 hereto. Retail information, especially that provided by unaffiliated resellers, is not required from resellers and, when it is volunteered, is protected. In addition, in its wholesale operations Springwich has no way of knowing the identity of the resellers' customers since each reseller controls the identity of its own customers. Accordingly, Springwich is not in a position to target a reseller's customers specifically or to pass such information to its affiliated resale operations. *See* Exhibit 6 attached hereto.

At the conclusion of the underlying proceeding, the Department questioned the role of Springwich's management on retail pricing decisions. The Department did not, however, conclude that those practices constituted anti-competitive conduct. Both Springwich and BAMM acknowledge that, on one occasion each, over the past ten years, they each provided information concerning a new wholesale rate plan to their retail affiliate slightly ahead of notifying other

^{58/} The small portion of cross-charges that are allocated (as opposed to directly billed) amount to only approximately 1 % of expenses.

resellers. Both carriers testified that these were isolated instances that were promptly corrected and that they otherwise have adhered always to the practice of providing all resellers with information concurrently. Springwich submits that a single, one-time instance of advance notice of a rate change does not justify continued rate regulation.

VI. SPRINGWICH HAS ACTIVELY SUPPORTED ITS RESELLER CUSTOMERS

As a wholesale cellular service provider Springwich values its relationship with all resellers of its services. It is in a wholesale carrier's interest to support resellers of its services and to assist them in expanding their customer base, and Springwich has consistently done so for all its reseller customers. Indeed, that Springwich is committed to the development of its reseller customers is evidenced by the fact that the number of end users served through non-affiliated resellers on the Springwich network outnumber by approximately four times those served by BAMM.

Springwich has provided various forms of support to its resellers to help them grow their businesses, including, but not limited to, reduced roaming charges, toll discounts, free customer service training, free demonstration lines, promotional literature, rate reductions and, in the case of several resellers, financial assistance as well. Unfortunately, in the case of one of the resellers, Springwich's efforts in this regard have been transformed into allegations of anti-

competitive conduct that the Department, while not making any conclusions as to Springwich's conduct, seeks to review further.^{59/}

The claims of coercive tactics and anti-competitive behavior cited in the Petition are based on the testimony of Luis Escobar, the president of Escotel Cellular and The Phone Extension (together "Escotel"), a copy of whose testimony was appended to the Department's Decision. All of the claims raised by Mr. Escobar are untrue. See Affidavit of Arthur H. Paquette attached as Exhibit 11 hereto. Escotel, a reseller that has experienced extreme financial difficulties over its years in cellular service, is currently in bankruptcy proceedings and Mr. Escobar is personally liable for the corporate debt.^{60/} Unfortunately, in the hearings before the Department, which occurred at the same time Escotel was attempting to negotiate a bankruptcy restructuring with Springwich, Mr. Escobar attempted to attribute the source of his business hardship to Springwich -- his largest creditor. Springwich, however, cannot be held responsible for insuring Escotel's success. The FCC has recognized that neither the carrier nor

^{59/} The Department did not conclude in its Decision that the allegations of coercive tactics were valid and did not make a finding of anti-competitive conduct.

^{60/} Escotel declared Chapter 11 bankruptcy in April, 1994, immediately prior to the Department's hearings in Docket No. 94-03-27. *In Re: Escotel Cellular, Inc., In Proceedings Under Chapter 11*, 94-51078, United States Bankruptcy Court for the District of Connecticut. During those proceedings, and after the record at the Department closed, the Trustee appointed by the bankruptcy court determined that the proceeding should be changed to an involuntary Chapter 7 proceeding to dissolve the company, and to remove Mr. Escobar from the company's operations during such dissolution based on the trustee's findings as to Mr. Escobar's business practices and behavior in conducting the affairs of the company in bankruptcy. See Affidavit of Arthur H. Paquette attached as Exhibit 11 hereto.

the regulator, but rather the competitive market, must determine the success or failure of a reseller:

we have never guaranteed that any reseller would make a profit. [Citations omitted.] A reseller is only guaranteed an opportunity to resell the cellular services of all facilities-based carriers on the same terms and conditions that carriers provide to their own customers. Profitability for the reseller as well as for the carrier will be based on the ability to operate successfully in a competitive environment.^{61/}

Furthermore, the specific allegations made by Mr. Escobar are disputed by the facts and are colored by his financial difficulties and his indebtedness to Springwich.^{62/} Springwich has attempted to work with Escotel in a number of ways, including particularly significant financial support. See Affidavit of Arthur H. Paquette attached as Exhibit 11 hereto. Having failed in its efforts, Springwich is now owed over a million dollars by Escotel.

The allegations of anti-competitive conduct originating with Mr. Escobar must be discounted given the circumstances surrounding his relationship with Springwich and new

^{61/} *Resale Policy Order*, *supra* n.15, at 1726.

^{62/} Included among Mr. Escobar's complaints that were not shared by other resellers were allegations regarding credits for dropped calls, interest charges on past due bills and yellow pages advertising. Escotel has routinely requested a blanket waiver for multiple calls placed within a single minute. See Exhibit 11 attached hereto. Given the approved one minute billing increments set forth in Springwich's tariff, separate calls that terminate and originate in one minute properly are billed as two calls. Springwich does provide all resellers, including Escotel, credits for calls dropped due to network coverage or interference when an end user requests the credit consistent with its policy set forth in Springwich's Reseller Guide. See Exhibit 11 attached hereto. Springwich charges interest on past due bills in accordance with its tariff. See Springwich Tariff Section A.2.f.2 attached to the Decision at Appendix 3; *Southern New England Tel. Co. Tariff Filing to Provide Bulk Domestic Public Cellular Radio Telecommunications Services*, Docket No. 84-08-16, Decision (Jan. 1985), at 6; Exhibit 11 attached hereto. The placement and price of Yellow Pages advertising is unrelated to the operations of the wholesale carriers. Springwich is not involved in Yellow Pages subscribership.

information which came to light in the bankruptcy proceeding after the Department's record was closed. See Report of the Bankruptcy Trustee appended to the Affidavit of Arthur H. Paquette attached as Exhibit 11 hereto. Indeed, the absence of any significant complaints of inappropriate behavior against the wholesale carriers by the other 14 resellers compels that the contrary testimony be given no weight. Moreover, none of the allegations in any way justify continued rate regulation by the Department, since the anti-competitive behavior complained of was either wholly unrelated to the carriers' rates or, where related to rates, was wholly consistent with the carriers' approved tariffs.

CONCLUSION

A comparison of the competitive conditions in the Connecticut cellular market with the factors identified by the FCC as pertinent to its examination of a CMRS market demonstrate that market forces in Connecticut will adequately protect subscribers against unjust and unreasonable rates and rates that are unjustly or unreasonably discriminatory.

- (i) **The number of CMRS providers in the state, the types of services offered by CMRS providers in the state, and the period of time that these providers have offered service in the state**
- There are multiple CMRS providers in Connecticut today.
 - Springwich has been providing wholesale cellular service in Connecticut since 1985.
 - The Metro Mobile companies began providing intrastate wholesale cellular services in 1987 and were acquired by Bell Atlantic in 1992.
 - At the retail level, fifteen resellers offer unregulated retail cellular services to consumers in Connecticut.